SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 9

BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF RUDOLPH J. FERES, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

The Government in its brief here has cross-referenced petitioner to its brief in *United States* v. *Griggs*, No. 31, this term, which will be argued after argument in this case, and *Jefferson* v. *United States*, No. 29, all raising questions in common.

The Government also undertakes to deal with certain special contentions advanced by the petitioner here.

We shall reply insofar as may be relevant.

I

There is no clear implication in the *Brooks* case that deaths "incident to service" are not included in "claims" under Federal Tort Claims Act.

We adopt and refer to respondent's argument in *United States* v. *Griggs*, pp. 13-16, inclusive.

II

Applying the Act as written will not subject the soldier-government relationship to the varying laws of the different States nor result in judicial intrusion into military affairs.

The Act Sec. 421(a) specifically provides that it [the Act] shall not apply to "any claim" * * * "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty * * * whether or not the discretion involved be abused."

Subdivision (h) excludes "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."

III

The provisions of the Military Claims Act which were supplanted (in part) by the Federal Tort Claims Act do not confirm the view as the Government claims (pp. 29-32 *Griggs* brief) that Congress intended to exclude such claims from the latter Act.

This Court's opinion in the *Brooks* case raises the question as to whether the *Military Claims Act* (57 Stat. 372; 31 USCA 223(b)) indicates a congressional intent to deny the general waiver of sovereign immunity to claims of military personnel because it excludes claims of military personnel for injuries or death occurring "incident to their

service". The *Military Claims Act* contains the following provision:

> "The provisions of this Act shall not be applicable • • • to claims for personal injury or death to military personnel or civilian employees of the Department of the Army or of the Army if such injury or death occurs incident to their service."

This Act, briefly summarized, authorizes the administrative settlement not in excess of $1000.00 of property damage and personal injury claims caused by noncombatant activities of the Army. Liability may exist *irrespective of fault* of army civilian or military personnel but negligence of the claimant bars recovery and the amount allowable for personal injury or death is *limited* to reasonable medical, hospital and burial expenses actually incurred. Personal injury and death claims of military personnel arising "incident to their service" are excluded presumably because adequate provision is made for the hospitalization, medical care and death of military personnel by the statutes referred to in the second Fourth Circuit *Brooks* decision (see *U. S.* v. *Brooks*, 176 F. 2d 482). Insofar as the Act is concerned with claims cognizable under the Tort Claims Act, it has been repealed by section 424(b) of the original Tort Claims Act (28 USCA 946), though there is a saving clause as to any claim which is not caused by the *negligence* of government employees.

The Military Claims Act does not cover *property damage* claims of military personnel occurring "incident to their service" presumably because provision for such claims are made in the Military Personnel Claims Act of 1945 (Act 29 May 1945; 59 Stat. 225) as amended (31 USCA 223(c)). Under this Act claims of military personnel for damage to or loss of personal property may be settled administratively when such property is used "incident to their service" un-

der conditions prescribed by the Secretary of the Army and "fault" of government employees is not a condition of recovery.

Nor does the Military Claims Act apply to claims arising in foreign countries. They too are treated separately. See Foreign Claims Act; Act 2, Jan. 1942; 55 Stat. 880; 31 USCA 224(d); as amended by the Act of 22 April, 1943, 57 Stat. 66.

The phrase "incident to their service" is not defined in the Military Claims Act or in the Military Personnel Claims Act. However, the Judge Advocate General of the Army has said that the phrase refers to "damages, loss or destruction of property being used by the claimant in the actual performance of some official duty at the time the damage, loss or destruction occurs * * *". See Claims By and Against the Government, Judge Advocate General's School Text No. 8, p. 39 (1944).

From this brief resume, it appears: (1) that Government liability for personal *property* damage claims of military personnel occurring incident to their service is based, not on culpability of Government employees acting within the scope of their employment, but on the type of activity in which the lost or damaged property is used, irrespective of fault; (2) that such claims are covered by the Military Personnel Claims Act and therefore were properly excluded from the Military Claims Act; (3) that personal *injury and death* claims of military personnel arising "incident to their service" were excluded from the Military Claims Act presumably because provision therefor has been made in other Federal statutes; (4) that since claims "incident to their service" are not based on "fault" of Government employees they have no place in the Tort Claims Act and the phrase should not be used to characterize claims of mili-

tary personnel which are predicated upon *negligence* of other service employees.

IV

The so-called administrative construction of the Act by the Army Department has little or no weight because:

(a) contrary to law.

(b) correctness has been challenged since inception.

(c) are not of such long standing as to require acceptance by the Courts.

V

The American Common Law did not refuse to recognize the right of a soldier to maintain an action against another soldier for acts arising while on duty.

In 36 *American Jurisprudence*, par. 119, p. 267.

"For Injuries to Subordinates or Other Members of Service.—As a general rule a military officer is not liable to a subordinate for acts in the furtherance of discipline so long as he acts within the scope of his duty and is not actuated by personal malice. An officer will, however, be liable to the soldiers under him for acting in an illegal and unauthorized manner toward them. Actions of trespass for injuries to the person have been frequently brought and sustained in the common-law courts against naval as well as military commanders, by their subordinates, for acts done both at home and abroad, under pretense and color of naval and military discipline. There are also cases where actions have been sustained against members of courts-martial, naval and military, who have exceeded their authority in the infliction of punishment. Likewise, an officer of militia issuing and executing a void warrant against a soldier of his company for a fine imposed on him, for neglecting to perform military duty, has been held liable in trespass for the arrest under it."

6 *Corpus Jurus Secundum*, p. 419.

> "A person in the military service has his civil remedies for any abuse of authority by his military superiors. Thus, actions have been brought by persons in the military service against their superiors, and persons acting under their direction, for various causes.[93] An officer is not answerable for an injury done within the scope of his authority, unless influenced by malice, corruption, or cruelty, although he may have committed an error or judgment in the exercise of his discretionary authority. The burden of proof is on plaintiff to show that the officer exceeded his authority."

The cases relied upon by the Government are not representative of the American Law and not based on claims for negligence.

In New York members of the State Militia are expressly relieved from civil liability and suit pursuant to a special statute (Section 15 Military Law, now Section 26).

This statute explains the decision of *Goldstein* v. *New York*, 281 N. Y. 396, relied upon by the Government. Furthermore that case cannot be controlling because unlike the Federal Tort Claims Act, the statute construed there contained no definition of an "employee" of the State broad enough to include military personnel. (Cf. Section 402, subd. (6) of Federal Tort Claims Act.) Nor was the New York Court of Claims Act, Laws 1920, Chapter 1922, a general sweeping waiver of immunity mentioning the Armed Forces as in the Federal Tort Claims Act.

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[93] "Assault—An action may be maintained against an officer of the navy for illegally assaulting and imprisoning one of his subordinates, although the act was done upon the high seas, and under color of naval discipline *Wilson* v. *Mackenzie*, 7 Hill (N.Y.) 95, 42 Am. D. 51.

Seizure of Property—An officer, authorized to arrest deserters, who takes property belonging to the deserters arrested must respond to the latter in an appropriate action. *Clark* v. *Cumins*, 47 Ill. 362."

Finally, the position assumed by the petitioner in the court below was fundamentally that the Act authorized a cause of action under the facts gleaned from the complaint; the use of the phrase "incident to service" by counsel below was not the use of a well defined phrase and the language unfortunate and should not be fatal in view of present fuller consideration of the real issues present.

Respectfully submitted,

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October 12th, 1950.